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## Ka Makani 'O Kohala Ohana Inc. v. Dep't of Water Supply, 295 F.3d 955 (9th Cir. 2002)

Staci A. McComb

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that the EPA had inconsistently interpreted the statute at issue, the court found that the EPA interpreted the statute today exactly as it did initially.

The Pronsolinos contended the EPA upset the balance of the federal and state control created by the CWA by establishing TMDLs for waters impaired only by nonpoint source pollution. The court disagreed and determined the Garcia River TMDLs served as an informational tool for the creation of the state's implementation plan, which Congress independently and explicitly requires. Thus, the court found no merit in the federalism argument.

Ultimately, the court upheld EPA's reasonable interpretation of the CWA, finding that the EPA did not exceed its statutory authority in identifying the Garcia River pursuant to section 303(d)(1)(A) and establishing the Garcia River TMDLs, even though the river was polluted only by non-point sources of pollution.

*Staci A. McComb*

**Ka Makani 'O Kohala Ohana Inc. v. Dep't of Water Supply, 295 F.3d 955 (9th Cir. 2002)** (holding the minimal economic involvement of a federal agency does not satisfy the National Environmental Policy Act's "major Federal action" requirement mandating an environmental impact statement).

Ka Makani 'O Kohala Ohana ("Ka Makani"), a citizen's coalition, filed suit in the United States District Court for the District of Hawaii requesting injunctive relief against the Hawaii Department of Water Supply ("DWS") and other federal and county agencies and officials pending the completion of a federal environmental impact statement ("EIS"). The district court granted summary judgment to the defendants, DWS. Ka Makani appealed to the Court of Appeals for the Ninth Circuit. The appellate court affirmed the district court's decision granting summary judgment to DWS.

DWS began planning the Kohala water project in 1987. The water project would transfer as much as 20 million gallons of groundwater per day from the northern part of Kohala to the southern part of Kohala. The project involved two governmental agencies, the United States Geological Survey ("USGS") and the United States Department of Housing and Urban Development ("HUD"). The USGS provided partial funding for the project and participated in a series of preliminary studies, which assessed the groundwater availability. In 1988, the DWS and the USGS entered into four Joint Funding Agreements, which divided the costs of the studies. HUD involved itself after Congress passed an appropriations bill allotting \$500,000 to the County of Hawaii for an EIS. HUD provided application materials and advice, including a recommendation restricting the scope of the activities. Narrowing the scope of the project exempted it from the

National Environmental Policy Act (“NEPA”) requirements, thus expediting the grant approval process. When HUD approved the grant, the funds were only to be used for preliminary purposes.

The DWS took \$30,000 in grant funds in 1995 to pay for the contractors working on the state EIS. This was the only time the DWS drew upon the grant funds. In 1998, the DWS placed the Kohala project on hold, but it assured HUD the project would resume. Finally, in 1999, the DWS reallocated the funds to another project in South Hilo.

Since NEPA did not have a separate judicial review provision and the suit involved legal issues, the appellate court relied on the reasonableness standard of review. The court noted that controlling weight is given to the agency’s interpretation of its own regulations unless it is plainly erroneous or inconsistent.

NEPA only required an EIS if “major Federal actions significantly affect the quality of the human environment.” Because there is no clear standard for determining what constitutes “major Federal action,” the analysis relies on the degree and nature of the involvement. Here, the court weighed the amount of funds actually spent on the project, the total amount of federal funding, and the total estimated cost of the project and concluded that HUD and USGS’s involvement did not constitute “major Federal action.” The court also found that there could not be any “major Federal action” because of the lack of decision-making power, authority and control HUD and USGS possessed over the project. Furthermore, the DWS always maintained final decision-making power over the project.

Ka Makani also argued that HUD’s own provisions required an EIS. The court found that HUD did not need to conduct an EIS if the grant is a special purpose grant, as it was in this case. Furthermore, the court held it illogical to conduct an EIS over the entire Kohala project.

*Staci A. McComb*

**Cmty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002)** (holding that notice of alleged Clean Water Act violations regarding a particular source is sufficient for all similar claims derived from that same source in a citizen suit, and past cited violations, along with evidence of present violations, is sufficient to establish an ongoing violation of the Clean Water Act).

The Community Association for Restoration of the Environment (“CARE”) brought a citizen suit against Henry Bosma and his two dairy operations (“Bosma”) in the United States District Court for the Eastern District of Washington, alleging that Bosma violated the Clean Water Act (“CWA”) by discharging pollutants and manure into